

# Bans of Political Parties and the Case of Golden Dawn's Right Wing Extremism in Greece

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Prosecution is pending in Greece against the Right Wing extremist party “Golden Dawn”. The accusations concern the criminal activity of the organization which is also a political party represented in Greek Parliament by 18 members. Golden Dawn is being prosecuted under article 187 of the Greek Penal Code, which imposes imprisonment up to 10 years to whomever “creates, or participates as a member in an organization composed by at least three members and with constant action aiming at committing more than one felonies” criminalized in a number of articles of the criminal code such as murder with intent (art. 299 of the Greek Penal Code), grievous bodily harm (art. 310), extortion (art. 385), as well as of felonies punished by special legislation on weapons, explosives etc.

## The Prosecutorial Finding Against Golden Dawn

The Prosecutorial Finding accuses members of the organization for having committed numerous hate crimes on the basis of their neonazi ideology ([Prosecutorial Finding](#), p. 2). The Finding accuses Golden Dawn of not only advocating hate against “races”, immigrants, the Roma community, mentally and physically handicapped, but also of engaging in acts of violence against members of these communities, considered by them as “enemies” (id, at 4). The same document describes the functioning of the organization as following a military structure with strict hierarchy whose violation led to harsh sanctions even violating the personality of the offender (id, at 4). According to the Finding, the organization was composed of special assault groups engaging in massive violent attacks committed by members, who have received special military training by the organization, initially against immigrants and later against Greek citizens designated as having different opinions from them and thus as “having to bear the consequences of this difference” (id, at 4-5). The Prosecutorial Finding accuses some the members of Golden Dawn of having committed murders, murder attempts, robberies, explosions, other violations of the law concerning explosives, intentional acts of grievous bodily harm and breach of peace (id, at 6). They are also accused of exploiting immigrants assigning them to sell products and then appropriating their profits in return for assuring them security (id, at 6), while police officials either tolerated this practice knowingly or even contributed to criminally prosecuted practices (Id, at 7).

## The Prosecution of a Political Party under the Greek Constitution

Since “Golden Dawn” has the form of a political party as well, questions have arisen as to the possibility to distinguish between the criminal and the political aspect of the relevant issues. The Greek Constitution foresees that Members of Parliament are not to be arrested or prosecuted for acts committed during the session of Parliament unless the Parliament gives special permission (art. 62.1). However, the constitution foresees that no permission is required for acts caught *in flagrante delicto* (art. 62.1). The existing case law has established that the crime the Golden Dawn MPs are being accused of, namely creation and participation in a criminal organization, is considered by definition *in flagrante delicto*. Therefore, no permission of Parliament is required for the offenders to be prosecuted and to be placed under temporary detention.

In the Greek Constitution, there is no explicit clause allowing for the possibility to outlaw political parties that do not serve democracy, like the clause of art. 21 of the German Basic Law. The Greek Constitution foresees only that political parties “must serve the free functioning of democracy” (art. 29, my translation). The pending prosecutions of members of Golden Dawn concern their criminal acts, not their ideology. Therefore, it seems easy to distinguish

between the criminal and the political aspect of Golden Dawn. The prosecutions do not raise any concerns of conformity with the constitution since the members of Golden Dawn are being prosecuted for their criminal acts and not their political ideology. Thus, the question whether political parties can be banned on the mere basis of ideology in the absence of a specific constitutional clause is not at stake in this case. What is at stake is the fact that there are accusations of concrete acts harming others. These acts are criminal offenses under general criminal law. This is a case of hate crimes where political ideas are being examined as proof of criminal intent when committing the acts. The criminal courts will primarily investigate whether the alleged acts have been committed by the accused and will evaluate the *mens rea* to define the proper criminal sanction. The Greek authorities are abiding by the rule of law and can only be reproached for having waited too long to start criminal proceedings against the alleged crimes of Golden Dawn. The Prosecutorial Finding accuses Golden Dawn of a series of crimes against immigrants. However, it was only the suspicion of having murdered a Greek citizen that led the authorities to activate the prosecutorial mechanism. The delay can be attributed to the delicacy of the matter since Golden Dawn has also a political character. The need to collect sufficient evidence was pertinent for the Greek authorities to be able to prosecute Golden Dawn as a criminal organization following article 187 of the Greek Penal Code.

## **Banning Political Parties on the Basis of Their Ideology?**

When a Constitutional text does not foresee explicitly the possibility for outlawing a political party advocating the subversion of democracy it is a matter of debate and constitutional interpretation of the relevant clauses whether this is possible. Strong reasons grounded within philosophical liberalism advocate against banning political parties on the basis of their ideology only, unless they commit specific criminal acts punished by criminal law (see Ioanna Tourkochoriti, *Should Hate Speech be Protected? Group Defamation, Party bans, holocaust denial and the Divide Between (France) Europe-U.S.A.*, 45 Columbia Human Rights Law Review, forthcoming 2014). Concrete manifestations of hate speech must be criminalized and punished whenever committed by anyone, even members of political parties, e.g. if they insult face to face on the basis of hate. Outlawing a political party as such, however, on the basis of its subversive discourse raises hard questions of political dilemmas of repression and/or accommodation: any defense of democracy through repression runs the risk of being a performative contradiction, resulting in a top-to-bottom negation of democracy in the name of defending it (Giovanni Capoccia, *Defending Democracy, Reactions to Extremism in Interwar Europe*, 2005, at 25).

Political liberties are important because they are essential to enact just legislation and to ensure that the fair political process established by the Constitution is available to everyone on a roughly equal basis (John Rawls, *Political Liberalism*, 1993, at 328). For John Rawls, free political speech together with the just political procedure specified by the Constitution provides an alternative to revolution and the use of force, which can be destructive to basic liberties (id, at 344). Thus, free political speech can be restricted only if it can be reasonably argued from the specific nature of the situation at hand that there exists a constitutional crisis in which democratic institutions cannot work effectively, and their procedures for dealing with emergencies cannot operate (id, at 354). The substantive evils whose prevention justifies limiting speech must be of a highly special nature, such as the loss of freedom of thought itself, including the fair value of political liberties, and there must be no alternative way to prevent these evils than the restriction of free speech (id, at 356).

The spreading of subversive advocacy is a sign of an imminent crisis, whose source is the perception by important sectors of society that the basic social structure is unjust and tyrannical. The revolutionaries give reasons for their revolt and indicate that they will take extreme measures when other measures to satisfy their claims have failed; the ban of subversive advocacy means limiting the debate on these reasons and would thus be a limitation of the free and conscious use of our reason when we judge the justice of the basic structure of our political society. A just political procedure as defined by the Constitution provides an alternative to revolution and the use of force by guaranteeing freedom of expression to revolutionary claims. The claims can then find a political expression, and a moderately governed regime will take them into consideration as a warning that fundamental changes may be necessary. A tolerant democracy must transform its enemy into a simple opponent by adopting the distinction between speech and action to keep in contact with political reality and thus with the public opinion, which designates

reality. The rise in popularity of extremist political parties plays the role of indicating that there is a deeply problematic social situation necessitating wide political measures.

## **A Historical Comparison: Prosecuting Hitler in the 1920s**

In general, it is impossible to respond to the question of whether only bans on the basis of political ideology can withhold a force coming from society. The question, however, is totally different when extremists commit criminal acts. Adolf Hitler was briefly prosecuted for committing criminal acts not only on the basis of his ideology (Aryeh Neier, *Defending My Enemy*, 163 (1979)). He was convicted for the “beer hall putsch” in the Bavarian Capital, Munich and received only minimal sentences despite the gravity of the offenses committed (ibid). Hundreds of political murders committed at the time by his supporters went unpunished (ibid). Had he and his supporters been punished properly in reference to the gravity of their criminal acts, then this might have upheld the current as criminal prosecutions could have delegitimized the political aspect of an ideology. When extremists engage directly in criminal acts, then criminal law should apply limiting their actions and exercising its function of general deterrence against committing unlawful acts and thus delegitimizing their existence within a democratic regime. Prohibitions of their discourse alone and their insignia are of doubtful effectiveness as history shows. Weimar Germany banned Hitler’s speeches as well as the wearing of uniforms and emblems indicating political affiliation; these bans proved meaningless (id, at 165). A democracy thus should not punish its ideological enemies unless they directly commit criminal acts. But when they do, it should punish them appropriately.

## **Conclusion: The Case of Golden Dawn in Light of Political Liberalism**

The reasoning in reference to political liberalism does not apply when political parties engage in criminal acts. In this case it is criminal activity that is being prosecuted and not the political ideology of a certain party. When this political ideology is directly instantiated in harmful acts, then ordinary criminal law applies just like for every other citizen. Ideology as such should not be punished. When it is, however, materialized in harmful acts, then the need for general deterrence emerges and the criminal intent is evaluated as part of the mens rea for attributing the proper criminal sanction. Reprehensible hateful acts whether they are just face to face insults motivated by hate or other acts constituting criminal offenses committed out of hatred cannot be tolerated in a constitutional democracy committed to the principles of philosophical liberalism.

To return to the case of the prosecution of Golden Dawn in Greece: The accusation of having committed criminal acts is enough from the point of view of political liberalism for the criminal process to begin against them. Criminal prosecution for the accusation of acts and not only ideological discourse is justified and imposed under political liberalism since such acts directly harm others.

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